

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

LEYSE, .
Plaintiff, .
vs. . Case No. 11-cv-07128
BANK OF AMERICA, NATIONAL . Newark, New Jersey
ASSOCIATION, . January 25, 2019
Defendant. .

TRANSCRIPT OF TELECONFERENCE AND RULING
BEFORE THE HONORABLE STEVEN C. MANNION
UNITED STATES MAGISTRATE JUDGE

This transcript has been reviewed and revised in accordance with L. Civ. R. 52.1.

APPEARANCES:

For the Plaintiff: GREG MICHAEL KOHN, ESQ.
Nagel Rice, LLP
103 Eisenhower Parkway
Roseland, NJ 07068
(973) 618-0400
Gkohn@nagelrice.com

TODD C. BANK, ESQ.
Attorney at Law, P.C.
119-40 Union Turnpike
Fourth Floor
Kew Gardens, New York 11415
(718) 520-7125
tbank@toddbanklaw.com

Audio Operator:

Transcription Service: KING TRANSCRIPTION SERVICES
3 South Corporate Drive, Suite 203
Riverdale, NJ 07457
(973) 237-6080

Proceedings recorded by electronic sound recording (not all parties were discernible on the record); transcript produced by transcription service.

1 (APPEARANCES continued)

2 For the Defendant: DAVID JOHN FIOCCOLA, ESQ.
3 Morrison & Foerster LLP
4 250 West 55th Street
5 New York, NY 10019
(212) 468-8000
dfiocola@mofa.com

6 ADAM J. HUNT, ESQ.
7 Morrison & Foerster LLP
250 West 55th Street
8 New York, NY 10019
(212) 336-4341
adamhunt@mofa.com

9
10 For the Interested
11 Party DialAmerica
Marketing Inc.: SAMUEL FELDMAN, ESQ.
Orloff, Lowenbach, Stifelman &
Siegel, P.A.
101 Eisenhower Parkway
Roseland, NJ 07068
(973) 622-6200
sf@olss.com

14 JEFFREY M. GARROD, ESQ.
15 Orloff, Lowenbach, Stifelman &
Siegel, P.A.
101 Eisenhower Parkway
16 Roseland, NJ 07068
(973) 622-6200
jmg@olss.com

18

19

20

21

22

23

24

25

	<u>I N D E X</u>	
3	<u>Proceeding</u>	<u>Page</u>
4	Proceedings	4
5	The Court's Ruling	16
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 (Commencement of proceedings at 10:53 A.M.)

3 THE COURT OFFICER: We are now on the record in
4 Leyse versus Bank of America, Docket Number 11-cv-7128.

5 THE COURT: All right. Appearance by local counsel
6 for plaintiffs?

7 MR. BANK: Good morning. This is not local
8 counsel. This is Todd Bank. I'm not sure -- remembered
9 counsel -- I thought he'd be out. I apologize that he's not.

11 THE COURT: When's the last time you spoke with
12 your local counsel about this conference?

13 MR. BANK: I believe he was notified. I should
14 say, Mr. -- defense counsel. I believe that's everybody.
15 I'm not sure if there was --

16 THE COURT: Okay. I'm happy to give you time to
17 find local counsel, because you sound like you're under
18 water. I can barely even understand what you're saying.

19 MR. BANK: Is it any better, Judge?

20 THE COURT: That sounds a little bit better.

21 How much time do you need to get your local counsel
22 on the line?

23 MR. BANK: I can find him, and I can call back in.
24 I can only -- I can do.

25 THE COURT: Okay. We'll pause there for a moment,

1 because I really can't understand what you're saying.

2 Let me have local counsel for defendants, Bank of
3 America?

4 MR. FIOCCOLA: Good morning, Your Honor. David
5 Fioccola from Morrison & Foerster. I have Adam Hunt on the
6 line with me as well.

7 THE COURT: All right. Welcome to each of you.

8 I'm sorry. Did we lose somebody?

9 (Simultaneous conversation)

10 MALE SPEAKER: Mr. Bank left the call just to
11 contact his local counsel.

12 THE COURT: Okay. All right. Who do I have on for
13 DialAmerica?

14 MR. GARROD: DialAmerica, nonparty, DialAmerica.
15 Jeff Garrod and Sam Feldman.

16 THE COURT: Jeff -- spell the last name?

17 MR. GARROD: It's Garrod, G-a-r-r-o-d.

18 THE COURT: G-a-r-r-o-d.

19 Who initiated this call?

20 MALE SPEAKER: Defendants.

21 THE COURT: Okay. So we're going to go off the
22 record, and I'll --

23 (Recess: 10:55 A.M. to 11:07 A.M.)

24 THE COURT: All right. We're back on the record in
25 the matter of Leyse versus Bank of America.

1 Local counsel for plaintiff?

2 MR. KOHN: Greg Kohn from Nagel Rice.

3 Sorry, Your Honor. Judge Orlofsky -- a mediation.

4 And he had me in, and I didn't realize the time.

5 THE COURT: All right. Spell the last name,
6 please.

7 MR. KOHN: Kohn, K-o-h-n.

8 THE COURT: K-o-h-n.

9 Okay. And do I have counsel back on for Bank of
10 America?

11 MR. FIOCCOLA: Yes, Your Honor. It's David
12 Fioccola from Morrison Foerster. Adam Hunt is also on.

13 THE COURT: All right. And DialAmerica?

14 MR. GARROD: Yes, Your Honor. Jeff Garrod and Sam
15 Feldman.

16 THE COURT: Okay. So pending before the Court is
17 plaintiff's motion for reconsideration, Docket Entry 157.

18 Have the parties resolved this issue?

19 MALE SPEAKER: No, we haven't, Your Honor.

20 THE COURT: All right. Then I've got some
21 questions for you, Mr. Leyse.

22 My first question -- not Mr. Leyse. Mr. Bank or
23 Mr. Kohn.

24 This is a fee-shifting matter? Correct? If your
25 client prevails, you expect to recover costs and fees from

1 the defense. Yes?

2 MR. BANK: No. No, Your Honor.

3 No, CCPA is not a fee-shifting statute.

4 MALE SPEAKER: Well, but the class action is.

5 MR. BANK: Well, it would be a -- fund, but it
6 would -- to say it's -- the statute is not a fee shifting
7 statute like the FDCPA, for example.

8 THE COURT: Okay. Well, I'm sure it's not like
9 a -- many different statutes. But for a class action, if you
10 prevail as a class action, do you not expect to recover costs
11 or fees?

12 If you're waiving costs or fees, I'm sure Bank of
13 America is very interested to hear that. But I'd just like
14 it clear.

15 MR. BANK: Well, it wouldn't be -- it would be a
16 common -- it wouldn't be from Bank of America. It would be,
17 under the common fund doctrine, setting any fees -- any legal
18 fees would be obtained from the -- not from Bank of America,
19 but from the --

20 THE COURT: Could you back away from your
21 microphone a little bit? Because it sounds like the
22 microphone is between your teeth.

23 MR. BANK: -- is this better?

24 THE COURT: Not really. Are you on a speakerphone
25 or speaking directly into a --

1 MR. BANK: No.

2 THE COURT: -- a handheld phone or --

3 MR. BANK: Well, it's a -- phone.

4 THE COURT: That sounds a little bit better,
5 whatever you just did there.

6 So -- okay. So you're not expecting to receive or
7 recover costs or fees from Bank of America in this action?

8 MR. BANK: Well, costs, perhaps, but small costs
9 that it might be, but fees, no.

10 THE COURT: Okay.

11 MR. FIOCCOLA: Your Honor, this is David Fioccola
12 from Bank of America. That's on the record. Right? I just
13 want to make sure.

14 THE COURT: We are on the record, yes. He's not
15 expecting to recover fees.

16 MR. FIOCCOLA: All right. Not expecting recovery
17 of fees. That's very helpful. Thank you.

18 THE COURT: Okay. All right.

19 Mr. Bank, please. It's your motion. Go ahead. If
20 you have anything to add to your paperwork. I've reviewed
21 the paperwork. It's pretty much the same paperwork that I
22 had with your first motion. But if there's anything else you
23 would like to add to it.

24 MR. BANK: I think I said everything in the motion.
25 And I think it's -- I think --

1 THE COURT: Okay.

2 MR. BANK: -- very clearly. I just would only note
3 that for about the third or fourth time, DialAmerica has
4 never even purported to refute what we -- what we've
5 explained in terms of their -- especially not -- 32,000 --
6 it's -- 13,000 that I've explained on pages 7 and 8 of
7 their -- the Court by virtue of its ruling, found that
8 anything above -- anything above 21,866 would be significant,
9 and, therefore, given that the real expenses are not even
10 that much -- and if you want to add the fact that DialAmerica
11 was requested but refused to provide any financial
12 information to the Court that would help the Court make a
13 proper assessment, the plaintiffs shouldn't have to pay
14 anything. There's no basis at all to impose any costs on the
15 plaintiff, given those -- given those two facts, especially
16 the first one.

17 THE COURT: Okay. Thank you very much, Mr. Bank.

18 Mr. Feldman?

19 MALE SPEAKER: Yeah.

20 MR. GARROD: This is Jeff Garrod, Your Honor.

21 THE COURT: Okay. Jeff Garrod.

22 Mr. Garrod, my question for you is does Rule 45
23 protect your client, a nonparty, from all expense or just
24 significant expense?

25 MR. GARROD: It provides for protection from

1 significant expense, which has been determined by Your Honor
2 in your first opinion --

3 THE COURT: I know what your papers say. So you're
4 agreeing that it does not protect your client from all
5 expense. Okay?

6 MR. GARROD: Well --

7 THE COURT: So if the Court -- let me finish.

8 MR. GARROD: I don't agree with that, Your Honor.
9 It protects us from significant expense, and Your Honor has
10 determined that 32,800 is a significant expense. That's in
11 your opinion.

12 THE COURT: I know. I wrote the opinion.

13 (Simultaneous conversation)

14 THE COURT: Mr. Garrod? I wrote the opinion, and I
15 read your papers. So I know -- I know your position.

16 Your position is the Court found 32-8 is a
17 significant expense. The Court did not find that 20,000 is a
18 significant expense.

19 Would you agree there?

20 MR. GARROD: No. I don't think that -- I didn't --
21 I didn't read that in your opinion at all.

22 THE COURT: Exactly. I did not find that. I did
23 not find \$20,000 to be significant expense. Correct?

24 MR. GARROD: No, you found 32,800 to be a
25 significant expense.

1 THE COURT: Yes. And I reduced --

2 (Simultaneous conversation)

3 THE COURT: -- Mr. Garrod, please -- finish.

4 And I reduced your client's share of that 32,000 to
5 approximately -- what? -- 21? \$22,000?

6 MR. GARROD: Well, Your Honor, as we explained in
7 our brief, we think Rule 45 and it's indicated in a Third
8 Circuit opinion we cited to Your Honor that the 32 -- is
9 all -- is all covered by the rule. It's all significant
10 expense, and, you know, it's all since the rule was amended.
11 I think the plaintiff's argument, you know, talks about the
12 case law that precedes the amendment to Rule 45. And the
13 Third Circuit opinion, which is -- the short one, but very
14 clear that the entire significant expense would be covered.

15 THE COURT: Okay.

16 So I ask you this, Mr. Garrod, would \$5,000 be a
17 significant expense for DialAmerica?

18 MR. GARROD: I think under the circumstances -- I
19 mean, I don't know the answer to that, Your Honor. We the
20 cost -- material is 32-8. It's not five.

21 THE COURT: So you're not answering the Court's
22 question. So my question is this: Mr. Bank said the Court
23 has not received any information from you or from DialAmerica
24 as to its ability to pay. Why shouldn't the Court order a
25 hearing and compel DialAmerica to be here, whether it be

1 closed hearing, open hearing, we could decide that later, why
2 shouldn't the Court order DialAmerica to be here to present
3 information to the Court as to its annual income, its net
4 worth, its ability to pay. Why shouldn't I do that?

5 MR. GARROD: Because that's not a criteria,
6 Your Honor. Under the law as it says -- under the rule as it
7 stands today, that's not a criteria. And that would be so
8 counterproductive to -- we're a nonparty. Okay? And it
9 would be so counterproductive to the purpose of the rule --
10 okay? -- which is to protect a nonparty from expending time,
11 effort, and money to obtain -- discovery that the plaintiff,
12 you know, probably should have gotten from Bank of America,
13 because whatever we had, we gave to Bank of America. And I
14 understand it was many years ago, and Bank of America, you
15 know -- reports of events may not have maintained that. But
16 that's not -- you know, that's not our fault. And that's not
17 our issue.

18 And to have a hearing on, you know -- we -- we
19 submitted an affidavit -- Your Honor's opinion said 32-8 is a
20 significant expense. That's, you know -- not only the Third
21 Circuit but other courts have said, under the amended
22 Rule 45, that's all, then, payable by the party who served
23 the subpoena.

24 THE COURT: So, Mr. Garrod, you understand here,
25 we're making possible case law that would have to help

1 | attorneys in future cases.

2 | So how is it that you believe the Court should
3 | determine significant expense if not to look at the actual
4 | nonparty and their ability to pay? You're saying that the
5 | Court should --

6 | (Simultaneous conversation)

7 | THE COURT: I'm not finished, Mr. Garrod. Do not
8 | cut me off again.

9 | You're saying that the Court should never look at
10 | the ability to pay of a nonparty?

11 | MR. GARROD: No, no. I'm not -- I'm saying the
12 | ability to pay is not one of the criteria that the Court
13 | should be considering under the amended Rule 45, because
14 | under that circumstance, then you would never have the
15 | situation where the party, the nonparty served with a
16 | subpoena, shouldn't pay some part of the cost. And that's
17 | clearly not what the cases that have decided this issue under
18 | the amended rule have ever determined.

19 | So we -- you know, the ability to pay is not the
20 | criteria. Okay?

21 | THE COURT: Okay. Well, then, what is your
22 | criteria for determining what is a significant expense for a
23 | particular nonparty? How do you -- how do you --

24 | (Simultaneous conversation)

25 | THE COURT: -- suggest the Court do that?

1 MR. GARROD: We submitted a declaration -- okay? --
2 which -- which said the cost is 32-8. That would be the cost
3 retrieve this material. And Your Honor, you know, found that
4 the 32-8 --

5 THE COURT: Mr. Garrod, if you don't want to answer
6 my question, just tell me you don't want to answer my
7 question.

8 MR. GARROD: Oh, I am -- I am answering.

9 THE COURT: No, you're not. No, you're not. What
10 you're telling me --

11 MR. GARROD: Well --

12 THE COURT: -- is that you provided a cost
13 estimate. You didn't -- you didn't give me anything to tell
14 me whether that's a significant cost or an insignificant
15 cost. All you did was you provided a cost estimate. And
16 then you're saying, because Judge Mannion found that to be
17 significant, therefore, what? In every case -- in every
18 case, the standard will be let's go back to what Judge
19 Mannion did in this one instance? We can't do that. That's
20 not workable. You're not providing the Court with anything.

21 So clearly you have nothing on this point.

22 MR. GARROD: Your Honor -- well, that's --
23 Your Honor, we provided you originally with a declaration
24 that the 32-8 would be the expense. And, you know -- and
25 Your Honor understood -- understood -- Your Honor found that

1 that was a significant expense, the 32-8, based on our
2 declaration. And Your Honor also made some statements in the
3 opinion that, you know, you understood that it would be, you
4 know, very time-consuming, it would take weeks to do, and
5 very substantial and arduous, and that's all based on the
6 declaration that was submitted to Your Honor.

7 THE COURT: Got it. Thank you. If you've got
8 nothing new to add, thank you.

9 All right. Anything from Bank of America, just to
10 make clear?

11 MR. FIOCCOLA: Yes, Your Honor, this is David
12 Fioccola. And, I think, if the Court wants to hear us on
13 this, I can talk for a couple of minutes. Maybe it would be
14 helpful?

15 If Your Honor wants to hear from us? Or --

16 THE COURT: I'm not inviting it. Do you have
17 something that you're burning to say?

18 MR. FIOCCOLA: No -- Your Honor. No --

19 THE COURT: Got it.

20 MR. FIOCCOLA: -- no. That's all I would -- okay.

21 THE COURT: All right.

22 Mr. Kohn or Mr. Bank, it was your motion. Last
23 word, anything to add?

24 MR. BANK: I'm sorry. This is Todd Bank.

25 No, I think I -- if the Court has questions, I'll

1 do my best to answer them in court.

2 THE COURT: Okay. You can put your phones on mute
3 while the Court delivers its decision.

4 The matter comes before the Court upon plaintiff
5 Mark Leyse's motion for reconsideration of the Court's order
6 requiring that Mr. Leyse bear one third of the expected cost
7 for nonparty DialAmerica to comply with his subpoena.

8 Mr. Leyse argues that DialAmerica should bear all of the
9 costs, and DialAmerica opposes, but in turn, argues that
10 Mr. Leyse should bear all of DialAmerica's costs of
11 compliance with the subpoena.

12 The Court has considered their respective
13 submissions and heard oral argument. Neither Mr. Leyse nor
14 DialAmerica have shown any intervening change in the
15 controlling law, nor have they presented any new evidence
16 that was not available to the Court when the Court made its
17 initial decision. And neither have demonstrated any need to
18 correct a clear error of law or fact or prevent manifest
19 injustice.

20 Mr. Leyse seeks reconsideration of the Court's
21 decision, pursuant to Rule 59(e), which allows a party to
22 seek alteration of a judgment. That rule does not pertain to
23 reconsideration of an interlocutory order such as the issue
24 before this Court. Nonetheless, a district court has the
25 inherent authority to reconsider its own interlocutory

1 orders.

2 This district -- this district's local rules govern
3 motions for reconsideration under Local Civil Rule 7.1(i).
4 Motions for reconsideration require the moving party to set
5 forth "concisely the matters or controlling decision which
6 counsel believes the Court has overlooked." A motion for
7 reconsideration under Rule 7.1(i) is extremely limited
8 procedural vehicle, and requests pursuant to the rule are to
9 be granted sparingly. Reconsideration is not appropriate
10 where the motion only raises a party's disagreement with the
11 Court's initial decision.

12 The scope of reconsideration under Rule 59(a) would
13 similarly be extremely limited. That's Blystone v. Horn, 664
14 F.3d 397 at 415 (3d Cir. 2011). It is not an opportunity for
15 a second bite at the apple.

16 Such motions are intended only to correct manifest
17 errors of law or fact or to present newly discovered
18 evidence. Stated otherwise, to prevail on a motion for
19 reconsideration, the moving party must show at least one of
20 the following grounds: (1) an intervening change in
21 controlling law; (2) the availability of new evidence that
22 was not available when the Court made its initial decision;
23 or (3) the need to correct a clear error of law or fact or
24 prevent manifest injustice.

25 Mr. Leyse essentially argues that DialAmerica's

1 actual expenses are only \$13,360, and given the Court has
2 already ordered DialAmerica to bear 66 percent of its
3 expenses, equalling approximately \$21,000, assuming a
4 baseline of 32-8, then the cost of 13,360 is not significant
5 under the Rule 45 standard. Thus, DialAmerica should be
6 ordered to bear its entire expenses.

7 However, Mr. Leyse already made this argument in
8 his original informal motion to compel. And the Court
9 rejected Mr. Leyse's cost estimate.

10 There is no new argument here and no claim that
11 this information comes from newly available evidence.
12 Mr. Leyse's motion is nothing more than a disagreement with
13 the Court's prior decision and, thus, improper for
14 reconsideration.

15 Likewise, DialAmerica has opposed Mr. Leyse's
16 motion for reconsideration, in response to the motion for
17 reconsideration, by arguing that the Court committed legal
18 error by not shifting one hundred percent of DialAmerica's
19 expenses to Mr. Leyse after the Court found the cost of 32-8
20 to be significant.

21 However, DialAmerica has blindly ignored that the
22 Rule 45 mandate requiring the Court protect nonparties from
23 significant expense does not require the requesting party to
24 bear the entire cost of compliance. Mr. Leyse must only bear
25 "at least enough of the cost of compliance to render the

1 remainder nonsignificant," citing Legal Voice v. Stormans
2 Inc., 738 F.3d 1178 at 1184 (9th Cir. 2013). This was
3 clearly stated in the Court's prior decision and again here.
4 Thus, DialAmerica's position also has no merit.

5 Moreover, DialAmerica has been willfully silent on
6 its annual revenue and its ability to pay. The Court could
7 consider holding a hearing on that issue, but instead finds
8 from the available evidence within the docket, of course,
9 reserving the right to hold such a hearing if the issue is
10 not resolved, that DialAmerica -- to DialAmerica, \$5,000 is
11 not a significant expense. Neither is 10,000, 15,000, or
12 even 20,000. The Court found that 32,800 was a significant
13 expense and therefore ordered Mr. Leyse to bear one third of
14 that expected cost and, accordingly, reduced DialAmerica's
15 burden to a point that was not significant expense for it.

16 In conclusion, there is no meritorious base of
17 reconsideration of the Court's order, as reconsideration is
18 not appropriate where the motion only raises the party's
19 disagreement with the Court's initial decision.

20 Mr. Leyse's request for reconsideration is denied.
21 An appropriate order shall be issued.

22 Counsel can unmute.

23 We'll go off the record.

24 (Recess: 11:25 A.M. to 11:26 A.M.)

25 THE COURT: Counsel has been asked -- Mr. Bank has

1 been asked what discovery has been done in this case since
2 November.

3 Mr. Bank, what discovery has been done since
4 November?

5 MR. BANK: First, I want to just reiterate, it was
6 just stated off the record, which is that I -- I stated to
7 the judge that I want to be on the record --

8 THE COURT: You're on the record, Mr. Bank.

9 Proceed. I have other matters.

10 MR. BANK: May I -- may I please -- I'm proceeding.
11 I'm proceeding --

12 THE COURT: To answer my question.

13 MR. BANK: Yes, I want to reiterate what was said
14 off the record so that you don't continue to abuse your
15 authority. Okay?

16 THE COURT: Abusing my authority?

17 MR. BANK: Excuse me, Judge. Excuse me, Judge.

18 THE COURT: Do not yell --

19 MR. BANK: -- my right.

20 THE COURT: Do not yell at me, Mr. Bank.

21 MR. BANK: Well, I feel like I had to so you would
22 hear me. I have my rights --

23 THE COURT: Mr. Bank --

24 MR. BANK: -- and I'm going to --

25 (Simultaneous conversation)

1 THE COURT: Do not yell.

2 MR. BANK: -- I intend to exercise my rights, right
3 now. We went on -- we went off the record.

4 THE COURT: Continue. Continue to make the record,
5 Mr. Bank. Go right ahead.

6 MR. BANK: -- off -- we went off -- you're not
7 going to let me speak. Right? You're not going to let me
8 speak on the record, because you want to cover up your abuse
9 of your power. Isn't that right, Judge? Isn't that right?

10 THE COURT: Continue, Mr. Bank. Continue.

11 MR. BANK: This is about covering your abuse of
12 authority, isn't it, Judge?

13 THE COURT: Continue on, Mr. Bank.

14 MR. BANK: Thank you. I will. We -- after Judge
15 read the ruling that he probably made all before he conducted
16 this phony oral argument that we just had for half an hour,
17 the judge said we were going off the record. I stated that I
18 wished to continue to be on the record, and the judge said
19 we -- and we went back and forth on that for a minute or so.
20 And then Judge then -- he stated -- and I don't -- I don't
21 know what the exact words were, and unfortunately, it's not
22 on the record, which itself I consider to be abusive in those
23 circumstances. But in any event, upon my insistence that we
24 go on the record, Judge Mannion said something to the effect
25 of that I would be subjecting myself to sanctions. He used

1 the word "sanctions." If Judge Mannion wants to repeat what
2 he said earlier so it can be -- so it can be more precise, I
3 actually would appreciate that.

4 THE COURT: Yes, Mr. Bank. I said I would allow
5 you to go on the record to make a record of sanctionable
6 conduct, if you wish. And you're doing that. So please
7 continue.

8 MR. BANK: Thank you, Judge. I don't know what the
9 sanctionable conduct was, but feel free to explain it to me.

10 THE COURT: Are you finished, Mr. Bank?

11 MR. BANK: Feel free to explain to me the
12 sanctionable conduct --

13 THE COURT: Mr. Bank, I don't answer to you.

14 MR. BANK: Yes, I just -- I'm -- of course not.
15 Why would you --

16 (Simultaneous conversation)

17 THE COURT: -- my question for you, Mr. Bank --

18 (Simultaneous conversation)

19 MR. BANK: -- authority.

20 (Simultaneous conversation)

21 THE COURT: Mr. Bank, do not cut me off. You're
22 wearing my patience thin.

23 (Simultaneous conversation)

24 MR. BANK: -- me speaking. Go ahead.

25 (Simultaneous conversation)

1 THE COURT: My question for you, what discovery
2 have you done since November? That is the question.

3 Which we could have done off the record --

4 MR. BANK: Since November?

5 THE COURT: Yes, what discovery have done since
6 November?

7 MR. BANK: I don't recall offhand what discovery
8 has been done since November, because we've been fighting
9 this battle for -- with DialAmerica.

10 THE COURT: Thank you.

11 MR. BANK: -- discovery -- I'm not -- I'm not
12 finished.

13 THE COURT: Yes, you are. Thank you.

14 MR. BANK: No, I wasn't finished.

15 THE COURT: Mr. Feldman --

16 (Simultaneous conversation)

17 MR. BANK: No, I wasn't finished. No, I wasn't --
18 not going to -- up anything. I'm not finished. I am not
19 finished.

20 So we've been conducting --

21 THE COURT: Mr. Bank, again, you're crossing the
22 line --

23 (Simultaneous conversation)

24 MR. BANK: -- that -- let me finish, please.

25 (Simultaneous conversation)

1 THE COURT: Mr. Bank --

2 (Simultaneous conversation)

3 MR. BANK: -- which is DialAmerica --

4 (Simultaneous conversation)

5 THE COURT: -- I asked you what discovery you've
6 done.

7 (Simultaneous conversation)

8 MR. BANK: -- I don't know what since -- Judge,
9 please don't cut me off. I don't cut you off. You asked me
10 not to cut you off. I ask you for the same courtesy.

11 THE COURT: Mr. Fioccola --

12 (Simultaneous conversation)

13 MR. BANK: -- same courtesy you demand. So, again,
14 I think --

15 (Simultaneous conversation)

16 THE COURT: Mr. Fioccola --

17 (Simultaneous conversation)

18 MR. BANK: -- the only discovery has been vis-à-vis
19 DialAmerica, so I'm not sure other than the --

20 (Simultaneous conversation)

21 THE COURT: I think you need to speak to your local
22 counsel, Mr. Bank.

23 Mr. Fioccola, what discovery has been done --

24 (Simultaneous conversation)

25 THE COURT: -- since November?

1 (Simultaneous conversation)

2 MR. BANK: -- abuse of power, Judge. It's duly
3 noted. Hopefully -- hopefully on the record.

4 THE COURT: Mr. Fioccola, what discovery has been
5 done since November, if any?

6 MR. FIOCCOLA: Your Honor, with respect to Bank of
7 America, there's been no discovery. And if I recall
8 correctly -- and Mr. Hunt will correct me if I'm wrong,
9 discovery issue, Bank of America, has been closed since
10 before all of the depositions that Mr. Bank took of
11 DialAmerica. And so the only open issue was the current
12 discovery motion that Your Honor just decided. And we had
13 discussed a couple conferences ago that once this issue on
14 discovery was resolved at the appropriate time, coming up
15 with a schedule for simultaneously moving for summary
16 judgment and class certification.

17 | THE COURT: All right. Thank you, sir.

20 MR. GARROD: Nothing, Your Honor. Mr. Fioccola --

21 | THE COURT: Nothing as to DialAmerica?

22 MR. GARROD: Well, other than the motion. The only
23 discovery -- we're a nonparty, Your Honor, as you know. But
24 the only discovery relates to the subpoena, which was the
25 subject of the motion which Your Honor decided, and then

1 there was the reconsideration motion, which Your Honor just
2 decided now.

3 THE COURT: Okay.

4 MR. GARROD: So there was nothing --

5 MR. FIOCCOLA: Yeah, and I think, Your Honor --
6 this is -- this is David Fioccola again. I think that the
7 setup here, because I know this goes back over a year, they
8 had taken -- Mr. Bank had taken the deposition of, I think,
9 five or six DialAmerica employees, which culminated, I think,
10 in the deposition of the CEO. And that was, I think, mostly
11 directed at trying to get the information that Mr. -- that
12 was the subject -- was the subject of Mr. Bank's motions. So
13 that was, kind of, I think, the only open issue with respect
14 to discovery that was left for -- because he has already
15 deposed everyone at company. So it was really just this last
16 issue about -- open that was keeping discovery, you know --
17 quote/unquote open for purposes of this -- this motion.

18 THE COURT: Okay. So after the Court's decision at
19 Docket Entry 155, DialAmerica requested a stay pending
20 appeal. That request was denied. The case has not been
21 stayed. Discovery is to continue.

22 So, Mr. Garrod or Mr. Feldman, have you received a
23 deposit from plaintiff towards the cost of the discovery?

24 MR. GARROD: No, Your Honor. And I think
25 Mr. Bank's motion for reconsideration stayed the time to

1 appeal while Your Honor's first decision --

2 THE COURT: Well, it tolled the time. It didn't
3 stay the case.

4 MR. GARROD: Well, it tolled. It doesn't stay --
5 yeah, but we have not received a deposit. That's -- that
6 answers your question.

7 THE COURT: Thank you. It does.

8 Okay. Anything else for DialAmerica today?

9 MR. GARROD: No.

10 THE COURT: Anything else for Bank of America
11 today?

12 MR. FIOCCOLA: No, Your Honor.

13 THE COURT: Anything else Mr. Leyse today?

14 MR. BANK: No.

15 THE COURT: Okay. Thank you very much. We're
16 adjourned.

17 (Conclusion of proceedings at 11:33 A.M.)

18

19

20

21

22

23

24

25

1 | Certification

2 | I, SARA L. KERN, Transcriptionist, do hereby certify
3 | that the 28 pages contained herein constitute a full, true,
4 | and accurate transcript from the official electronic
5 | recording of the proceedings had in the above-entitled
6 | matter; that research was performed on the spelling of proper
7 | names and utilizing the information provided, but that in
8 | many cases the spellings were educated guesses; that the
9 | transcript was prepared by me or under my direction and was
10 | done to the best of my skill and ability.

11 | I further certify that I am in no way related to any of
12 | the parties hereto nor am I in any way interested in the
13 | outcome hereof.

14 |

15 |

16 |

17 |

18 | S/ *Sara L. Kern*

18 | 31st of January, 2019

19 | Signature of Approved Transcriber

19 | Date

20 |

21 |

22 | Sara L. Kern, CET**D-338
22 | King Transcription Services
23 | 3 South Corporate Drive, Suite 203
23 | Riverdale, NJ 07457
23 | (973) 237-6080

24 |

25 |